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NO. SCAP-16-0000462

IN THE SUPREME COURT OF THE STATE OF HAWAI‘I

TAX FOUNDATION OF HAWAI‘I, a Hawai‘i nonprofit corporation, on behalf of itself and those similarly situated,

Plaintiff-Appellant,

vs.

STATE OF HAWAI‘I,

Defendant-Appellee.

CIVIL NO. 15-1-2020-10

APPEAL FROM THE:

1) FINAL JUDGMENT, filed June 1, 2016; and 2) ORDER GRANTING DEFENDANT'S MOTION TO DISMISS COMPLAINT FILED ON OCTOBER 21, 2015 (FILED ON NOVEMBER 10, 2015), filed May 16, 2016

FIRST CIRCUIT COURT

HONORABLE EDWIN C. NACINO
Judge

SUPPLEMENTAL BRIEF OF DEFENDANT-APPELLEE STATE OF HAWAI‘I

CERTIFICATE OF SERVICE

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SUPPLEMENTAL BRIEF OF DEFENDANT-APPELLEE STATE OF HAWAI'I

Pursuant to this Court's Order entered on September 28, 2017, Defendant-Appellee STATE OF HAWAI'I ("the State") hereby submits the instant Supplemental Brief for the Court's consideration.

I. ISSUE PRESENTED

"The relevance, if any, of Act 1 (S.B. 4), 29th Leg., 1st Spec. Sess. (2017),[1] to the disposition of this case?"

II. ARGUMENT

A. The Enactment of Act 1 Supports the State's Argument in its Answering Brief that this Matter Belongs in the Legislature and Not in the Courts.

On page 1 of the State's Answering Brief, the State argued:

> Plaintiff's quarrel is with the Legislature rather than State executive departments, and Plaintiff should seek relief from the Legislature rather than from the courts. If Plaintiff disagrees with a statute passed by the Legislature, it should lobby the Legislature to amend it. Asking the courts to interfere with a statute, when it is valid under the rational basis test, is not only inconsistent with modern constitutional principles but it also violates the separation of powers at the heart of our system of government.

Answering Brief ("A.B."), at 1. On page 31 of its Answering Brief, the State argued:

> In the present case, Plaintiff would draw the line between the amount going to the State and the amount going to the City at something less than ten percent. However, this is an exercise in line-drawing that is properly the responsibility of the Legislature. Even if the line has been improperly drawn, Plaintiff's remedy is to go to the Legislature and seek an amendment of the ten percent figure in HRS § 248-2.6. Plaintiff should not be able to ask the Judiciary to redraw the line for it. If Plaintiff is allowed to do so, it sets a dangerous precedent. Any line drawn by the Legislature would then be subject to alteration by the Judiciary. Any time ***a specific amount or percentage*** is set by the Legislature, the Judiciary could then second-guess the Legislature and set a different amount or percentage. This would be a vast expansion of the power of the Judiciary that would severely conflict with modern constitutional principles. *Compare Williamson v. Lee Optical*, 348 U.S. 483 (1955) (holding that "[t]he day is gone when [courts could

[1] Available at http://www.capitol.hawaii.gov/ splsession2017a/GM102_.pdf.

> strike down social/economic laws] because they may be unwise, improvident, or out of harmony with a particular school of thought") *with Lochner v. New York*, 198 U.S. 45 (1905) (striking down state social/economic regulation of bakers).

A.B. at 31. *See also* A.B. at 38.

Act 1 reflects exactly what the State argued in its Answering Brief. Section 5 of Act 1 amended the ten percent deduction in HRS § 248-2.6(a) by reducing it to one percent. Act 1, § 5, at 6. Changing the ten percent deduction was within the Legislature's proper role and the Legislature acted. If there is a problem with the "fit" between HRS § 248-2.6 and its purpose, that problem is the responsibility of the Legislature to resolve through the legislative process. As long as there is a minimally rational basis supporting HRS § 248-2.6, it is improper for the Judiciary to interfere with the statute under the guise of constitutional interpretation. The enactment of Act 1 demonstrates that the Legislature knows its responsibilities and can be relied upon to perform them.

It should also be noted that the enactment of Act 1 was a difficult process that extended through the 2017 Regular Session of the Legislature and necessitated a Special Session. It was a highly political process that involved the House of Representatives, the Senate, the Governor, and County governments, particularly the City and County of Honolulu. *See* Stewart Yerton & Courtney Teague, *How the Legislature's "Big Five" Crafted a Deal to Rescue Honolulu Rail*, Honolulu Civil Beat, Sept. 5, 2017, http://www.civilbeat.org/2017/09/how-the-legislatures-big-five-crafted-a-deal-to-rescue-honolulu-rail/. The result was the enactment of a law that delicately balanced many competing interests. Therefore, the general issue of the funding of the rail project is one in which the political branches of government are heavily involved and in which complex and carefully crafted legislation is produced. The State respectfully suggests that if this Court were to insert itself into such an issue, contrary to well-established principles of

constitutional law, it would have a severely detrimental effect on our constitutional system of government as a whole and on this Court as an institution.

The State does not mean to suggest that this Court should abandon its responsibilities when fundamental rights or suspect classifications are involved. However, the instant case merely involves social and economic legislation (in fact, tax legislation) and only the rational basis test is implicated. "Only by faithful adherence to this guiding principle of judicial review of legislation [i.e., the rational basis test] is it possible to preserve to the legislative branch its rightful independence and its ability to function." *FCC v. Beach Communications, Inc.*, 508 U.S. 307, 315 (1993).

Therefore, if this Court were to reach the merits of this case, notwithstanding the fact that the State asserts that the court below lacked jurisdiction and the presence of other threshold procedural issues,[2] Act 1 supports the State's arguments and this Court should rule in favor of the State.

B. Enactment of Act 1 Demonstrates that the Intent of the Legislature is, and Has Been, that the Specific Percentage in HRS § 248-2.6 Should Control.

In Section 5 of Act 1, the Legislature amended the specific percentage of the deduction going to the State from ten percent to one percent. Act 1, § 5, at 6. The fact that the Legislature amended the specific percentage amount rather than the rest of HRS § 248-2.6 indicates that the Legislature intended the specific percentage to control rather than require calculation of actual costs. If actual costs controlled, there would be no point in amending the specific percentage. And by not amending the definition of costs in HRS § 248-2.6(c), it indicates that that provision

[2] The State respectfully reminds the Court that the actual basis for the circuit court's decision was the jurisdictional question of whether tax controversies can be addressed in declaratory judgment actions. The enactment of Act 1, which involves both the General Excise Tax and the Transient Accommodations Tax, highlights the fact that this is indeed a tax controversy.

is merely an explanation of what the Legislature was trying to do in setting a specific percentage and does not mandate calculation of actual costs.

Although this amendment to HRS § 248-2.6 does not apply retroactively, *see* Act 1, § 20, at 32, it does aid interpretation of the statute by demonstrating the Legislature's intent. Courts have often used "subsequent legislative history or amendments" to confirm their interpretations of statutory provisions. *Pacific Int'l Servs. Corp. v. Hurip*, 76 Hawai'i 209, 217-18, 873 P.2d 88, 96-97 (1994); *Franks v. City and County of Honolulu,* 74 Haw. 328, 340 n.6, 843 P.2d 668, 674 n.6 (1993). "[I]mplicit in the task of statutory construction is our foremost obligation to ascertain and give effect to the intention of the legislature[.]" *Haw. Gov't Employees Ass'n v. Lingle*, 124 Hawai'i 197, 202, 239 P.3d 1, 6 (2010). Therefore, the Legislature's intent behind HRS § 248-2.6, as clarified by the subsequent amendment in Act 1, was that the specific percentage in HRS § 248-2.6(a) controls.

The State believes that Tax Foundation is likely to point to Section 9 of Act 1, where a new HRS § 237D-2(e)(2) provides that money will be deducted from the mass transit special fund and paid to the State general fund "[i]f a court of competent jurisdiction determines that the amount of county surcharge on state tax revenues deducted and withheld by the State, pursuant to section 248-2.6, violates statutory or constitutional law[.]" Act 1, § 9, at 16. This provision does not amount to a concession by the Legislature that the instant lawsuit has any merit. Instead, it is merely a prudent measure to minimize the harm that an adverse ruling from this Court would cause. More importantly for purposes of this case, this provision confirms that the intent of the Legislature is and always has been that the State retain the funds between actual costs and ten percent rather than give them to the City. This provision operates to deprive the City of a windfall that the Legislature never intended the City to receive, should such a windfall

be ordered by this Court.[3]

III. CONCLUSION

For the foregoing reasons,[4] the State respectfully requests that this Court affirm the circuit court's judgment in this case.

DATED: Honolulu, Hawai'i, October 12, 2017.

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[3] The State believes that Tax Foundation will also argue that this provision is unconstitutional. However, the constitutionality of this provision is not before this Court and it would be improper for this Court to decide that issue now. Nevertheless, in response to Tax Foundation's anticipated arguments, the State asserts that this provision does not force the City to pay a previously accrued claim but is merely a future funding measure that ensures that the same total amount of money is transferred to the City for rail project purposes and the City does not receive a windfall. Of course, should this Court rule in favor of the State in the instant case, the validity of this provision would never become an issue.

[4] Tax Foundation's lawsuit has also likely been rendered moot by Act 1. This case is a declaratory judgment action requesting injunctive relief. ***Going forward***, Act 1 reduces the ten percent deduction to one percent. Therefore, Tax Foundation's objection to the State receiving an allegedly excessive amount of rail project funds has been addressed by the Legislature. Since a "present, live controversy" no longer exists, this case is moot. *See Kemp v. State of Hawai'i Child Support Enforcement Agency*, 111 Hawai'i 367, 385, 141 P.3d 1014, 1032 (2006). Any claim for reimbursement of ***past*** funds would be barred by sovereign immunity. Although sovereign immunity is not a bar to prospective injunctive relief, *see Ex Parte Young*, 209 U.S. 123 (1908), it remains a bar to ***retrospective*** injunctive relief. *See Sierra Club v. Dep't of Transp. of State of Hawai'i*, 120 Hawai'i 181, 226, 202 P.3d 1226, 1271 (2009). Therefore, Tax Foundation's claim for reimbursement of past amounts is barred. Consequently, there is nothing left of this case, and this Court may dismiss this appeal or affirm the circuit court's judgment dismissing the case based on these grounds. Note that mootness and sovereign immunity are matters of subject matter jurisdiction that can be raised at any time. *Hamilton ex rel. Lethem v. Lethem*, 119 Hawai'i 1, 4, 193 P.3d 839, 842 (2008) (mootness); *Kaho'ohanohano v. Dep't of Human Services*, 117 Hawai'i 262, 281, 178 P.3d 538, 557 (2008) (sovereign immunity).

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CERTIFICATE OF SERVICE

I certify that the Supplemental Brief of Defendant-Appellee STATE OF HAWAI‘I was either served electronically (through the Court’s JEFS system), or conventionally (by mailing a copy via USPS, first class, postage prepaid), upon the following on October 12, 2017:

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